UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 9

In re:	Docket No. EPCRA-09-94-0015
CATALINA YACHTS, INC.,	MOTION FOR ACCELERATED DECISION
Respondent.	

COMES NOW THE COMPLAINANT, the United States Environmental Protection Agency (EPA), Region 9, by David M. Jones, its attorney of record, pursuant to the authority set forth at 40 C.F.R. § 22.16(a) and § 22.20(a) and moves the Honorable Spencer T. Nissen, the Presiding Administrative Law Judge in the above-entitled matter for an accelerated decision in Complainant's favor as to all or any part of Respondent's liability for the violations of Title III of the Superfund Amendments and Reauthorization Act, 42 U.S.C. §§ 11001 et seq. as charged in the Complaint and Notice of Opportunity for Hearing (Complaint) filed with the Regional Hearing Clerk, Region 9 on June 20, 1994.

This Motion for Accelerated Decision is based on the attached Memorandum In Support Of Complainant's Motion For An Accelerated Decision and the record on file in this administrative enforcement proceeding.

Dated: October 4, 1994.

Respectfully submitted,

David M. Jones

Counsel for Complainant

CERTIFICATE OF SERVICE

I hereby certify that the original copy of the foregoing Motion for an Accelerated Decision was filed with the Regional Hearing Clerk, United States Environmental Protection Agency, Region 9 and that a copy was sent by First Class Mail to:

Spencer T. Nissen
Administrative Law Judge
Office of Administrative Law Judges
United States Environmental Protection Agency
401 M Street, Room 3706 (A-110)
Washington, D. C. 20460

and to:

Robert D. Wyatt, Esquire
BEVERIDGE & DIAMOND
One Sansome Street, Suite 3400
San Francisco, CA 94104-4438

11-4-94
Date

Office of Regional Counsel
U. S. Environmental Protection
Agency, Region 9

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 9

In re:	Docket No. EPCRA-09-94-0015
CATALINA YACHTS, INC.,	MOTION FOR ACCELERATED DECISION
Respondent.	

MEMORANDUM IN SUPPORT OF MOTION FOR ACCELERATED DECISION ON LIABILITY

I. INTRODUCTION

A. Statement of Relief Requested.

The Complainant, the United States Environmental Protection Agency (EPA), Region 9, hereby submits this brief in support of its Motion For An Accelerated Decision pursuant to 40 C.F.R. §§ 22.16 and 22.20, for an Order granting Complainant an accelerated decision with regard to the liability of Respondent for all counts alleged in the Complaint. Accelerated decision is appropriate in this case as the only issue raised by Respondent with respect to liability is one for which no genuine issue of material fact exists and for which Complainant is entitled to a decision in its favor as a matter of law.

B. Background.

On November 15, 1993, an authorized representative of EPA, Region 9, conducted an inspection of the facility, as that term is defined by Section 329(4) of Title III of the Superefund Amendments and Reauthorization Act, also known as the Emergency Planning and Community Right-to-Konw Act of 1986 (EPCRA) [42 U.S.C. § 11049(4)], owned and operated by Respondent, located at 21200 Victory Boulevard, Woodland Hills, California (hereinafter "Facility"). The neutral scheme used by Complainant in selecting Respondent's facility for inspection is based on the Standard Industrial Classification Codes. The Code for Respondent is 3732, boat and boat building. A follow-up inspection was conducted on May 19, 1994.

Information obtained during the inspections or submitted later by Respondent shows that Respondent has 10 or more "full time employees", as that term is defined at 40 C.F.R. § 372.3. In addition, toxic chemicals were "processed and otherwise used", as that term is defined in 40 C.F.R. § 372.2, at the Facility in quantities exceeding the threshold established in Section 313(f) of EPCRA [42 U.S.C. § 11023(f)] during the years 1988, 1989, 1990, 1991 and 1992. According to the data base maintained by EPA, there were no Form Rs submitted for any of the aforementioned years prior to the EPA inspection on November 15, 1993.

On June 20, 1994, EPA, Region 9 commenced the prosecution of this civil administrative enforcement litigation with the issuance of a Complaint and Notice of Opportunity for Hearing ("Com-

plaint") pursuant to the authority set forth in Section 325(c) of the EPCRA. A copy of the Complaint is attached hereto and marked as **Exhibit A**.

The Complaint consists of seven separate counts. Counts I and II charge Respondent with failure to submit a Form R covering the usage of acetone for the years 1988 and 1989 in violation of Section 313 of EPCRA [42 U.S.C. § 11023] and 40 C.F.R. Part 372. Counts III through VII charge Respondent with failure to submit a Form R covering usage of styrene for the years 1988, 1989, 1990, 1991 and 1992, also in violation of Section 313 of EPCRA and 40 C.F.R. Part 372.

Respondent's Answer To Civil Complaint ("Answer") was filed with the Regional Hearing Clerk, Region 9, on July 14, 1994. Respondent admits in the introductory paragraph of the Answer that it is a "person", an "owner or operator" of the Facility, the SIC for the Facility is 3732 and that there are ten or more "full-time employees" at the Facility. The introductory paragraph concludes with a general denial which reads as follows:

> Respondent is continuing to review its records and is at the present time unable to respond to the remaining allegations in . . . the Complaint and, therefore, denies each and every remaining allegation. Respondent reserves the right to amend its Answer when it completes its review.

Respondent's response to each of the seven counts which follows, is a denial based on the review of its records. There is no indication that Respondent has completed "its review" of the records to date. See **Exhibit B** hereto, a copy of Respondent's Answer.

II. ARGUMENT

A. An Accelerated Decision is Appropriate Where There Is No Genuine Issue As To Material Fact And Movant Is Entitled To An Initial Decision As A Matter Of Law.

Section 22.20 of the Consolidated Rules provides that the Presiding Administrative Law Judge ". . . may **at any time** render an accelerated decision in favor of the complainant or respondent as to all or any part of the proceeding without further hearing or upon such limited additional evidence, such as affidavits, as he may require . . ." .[Emphasis Supplied] The standard for granting a motion for accelerated decision is found in Section 22.20(a) which states in pertinent part, that the motion may be granted when ". . . there is no genuine issue of material fact and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding." Where a decision ". . . is rendered on less than the total number of issues and or claims raised in the proceeding . . ." the Presiding Administrative Law Judge's Order shall specify the facts which appear substantially uncontroverted and the issues and claims upon which the hearing will proceed. 40 C.F.R. § 22.20(b)(2).

The standard for accelerated decision set forth above mirrors the federal standard for summary judgment found in Rule 56 of the Federal Rules of Civil Procedures.[1] Rule 56(c) of the Federal Rules of Civil Procedure provides for the granting of

---

[1] In fact, the operative language of Rule 56(c) is virtually identical to that used in 40 C.F.R. § 22.20(a): ". . . if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law . . ." .

summary judgment to a party when ". . . there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." The governing principles have been aptly summarized in Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d Section 2725 as follows:

> **This provision, which is the very heart of the summary judgment procedure, demonstrates that the principal judicial inquiry required by Rule 56 is whether a genuine issue of material fact exists. If no such issue exists, the rule permits the immediate entry of judgment.**
>
> **It necessarily follows from the standard set forth in the rule that when the only issues to be decided in the case are issues of law, summary judgment may be granted.** [Emphasis Supplied]

The thrust of a claim for summary judgment is to challenge the legal sufficiency of an opposing party's claim or defense. The accelerated decision procedure, like the summary judgment procedure, serves several purposes, including conserving the parties' resources and preventing harassment, *Keogh v. Washington Post Co.*, 365 F.2d 965 (D.C. Cir.1966, *cert.* denied, 385 U.S. 1011 (1967); avoiding waste of time and energy, *Polly Chin Sugai v. General Motors Corp.*, 137 F.Supp. 696, 700 (D. Idaho 1956); and promoting the efficient use of judicial resources, *Bros. Inc. v. W.R. Grace Mfg. Co.*, 261 F.2d 428, 432 (5th Cir. 1958). As the Fifth Circuit noted in the *Bros.* case summary judgment:

> . . . It is the means by which causes of defenses with no real merit are weeded out . . . without the cost in precious judicial time of a long protracted trial which ends with a determination that, on the facts viewed most favorably to a party, the claim or defense is not good as a matter of law. [Citations Omitted]

Since summary judgment serves such important functions, its

use is viewed favorably when applied to appropriate cases. *Freeman v. Continental Gin Co.*, 381 F.2d 459, 469 (5th Cir. 1967). It is particularly well suited to issues, such as the issues subject to this motion which turn on the construction of statutes, regulations and/or legislative history. *Standard Oil Co. v. Dept. of Energy*, 596 F.2d 1029 (Temp. Emer. Ct. App. 1978). Questions of policy are also properly addressed on summary judgment motions. *National Gerimedical Hospital & Gerontological Center v. Blue Cross of Kansas City*, 479 F.Supp. 1012 (D. Mo. 1979).

The burden of proof is on the movant to establish that there are no genuinely disputed issues of material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). Once the movant has made a *prima facie* showing equivalent to a showing that would entitle him to a directed verdict at trial, the burden shifts to the opposing party. *S.E.C. v. Murphy*, 626 F.2d 184 (7th Cir. 1980). It is important to note that neither speculation [*Bryant v. Commonwealth of Kentucky*, 490 F.2d 1273 (6th Cir. 1974)] nor assertions that the opposing party intends to produce countervailing evidence at trial [*E.P. Hinklet Co. v. Manhattan Co.*, 506 F.2d 201 (D.C. Cir. 1974)], will overcome entry of judgment for the movant once the movant has made a *prima facie* showing.

To grant summary judgment, the Presiding Administrative Law Judge need not find that no possible set of facts would entitle the Complainant to judgment, only that the Respondent has not successfully demonstrated the existence of a disputed issue of

material fact. *Peroff v. Manuel*, 421 F.Supp. 570 (D.D.C. 1976). What constitutes a material fact has been addressed repeatedly by the courts. The Seventh Circuit has ruled that facts are material if they constitute a legal defense. *Keehn v. Brady Transfer & Storage Co.*, 159 F.2d 383, 385 (7th Cir. 1947). The Ninth Circuit looks to whether the existence or nonexistence of the alleged facts might affect the outcome of the case. *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301 (9th Cir. 1982).

Minor factual disputes would not preclude an accelerated decision.[2] Disputed issues must involve "material facts" or those which have legal probative force as to the controlling issue. A "material fact" is one that makes a difference in the litigation.[3] Most significantly, if the legal controversy can be resolved without resolving the factual dispute, the facts are not material. *U.S. v. Suitmo ShoJi, New York, Inc.*, 534 F.2d 320 (C.D. Pa. 1976).

U.S. v. Suitmo exemplifies the situation in the instant action. The factual issues raised by Respondent in the Answer are irrelevant to the purely legal issue of whether Respondent has committed the violations of EPCRA and the implementing regulations charged in the Complaint and whether as a result of such violations a civil penalty is to be assessed.

Respondent's sweeping general denial that it is unable to respond because of a continuing review of its records is appar-

---

[2] *In Re: ENSCO, Inc.*(1992), Docket No. TSCA-VI-5320, p.18.

[3] *Id.*n.2, citing Words and Phrases, "Material Fact."

ently intended to place each and every allegation set forth in the Complaint at issue. Complainant contends that Respondent's general denials do not create the required issues of material fact. An adverse party must set forth specific facts showing that there is a genuine issue for trial.[4] Respondent has failed to do so.

B. Accelerated Decision As To Liability Should Be Granted Because The Facts Constituting A Violation Are Not In Dispute And Respondent Admits To Liability.

As indicated above, Catalina Yachts, Inc., a California corporation, was named as the respondent in the Complaint filed by Complainant with the Regional Hearing Clerk, Region 9. Catalina Yachts, Inc., as respondent, caused an answer to be filed as required by Section 22.15 of the Consolidated Rules.

Section 22.15(b) of the Consolidated Rules reads in pertinent part as follows:

> *(b) Contents of the answer.* The answer shall clearly and directly admit, deny or explain **each of the factual allegations** contained in the complaint **with regard to which respondent has any knowledge**. [Emphasis Added]

Section 22.15(d) of the Consolidated Rules reads in pertinent part as follows:

> (d) *Failure to admit, deny, or explain.* Failure of respondent to admit, deny or explain **any** material factual allegation contained in the complaint constitutes an admission of the allegation.

The general rule at EPA regarding the answer to a complaint was expressed some time ago in *In Re: Electric Service Company*

---

[4] Vanderheyden, ALJ in *In Re: James Cuthbertson, Floyd Richardson & Popile, Inc.*(1991), Docket No. RCRA-VI-832-H, p.3

(1981), Docket No. TSCA V-C-02 that 40 C.F.R. § 22.15(d) contemplates that a specific as opposed to a general denial is contemplated and that to place "at issue" facts in the Complaint, Respondent must plead material facts which contradict Complainant's allegations. By failing to respond properly to the factual allegations in the Complaint, under the rule set forth at Section 22.15(d) of the Consolidated Rules, Respondent is deemed to have admitted all such allegations.

Judge Ronald L. McCallum, of the Environmental Appeals Board, formerly Chief Judicial Officer, writing in *In Re: Landfill, Inc.*(1990) RCRA (3008) Appeal No. 86-8:

> Sections 22.15(b) and (d) together are designed to facilitate the proceeding by requiring particularity as to those facts which Respondent intends to challenge. Any material factual allegations which are not "clearly and directly" admitted, denied, or explained are deemed to be admitted. If Respondent has no knowledge of a particular factual allegation, he [Sic] must specifically so state for it to be deemed denied; otherwise, it is deemed admitted. This system allows all facts which are not seriously disputed to be established through the pleadings, and focuses the hearing on the remaining specifically disputed facts.

Landfill, Inc. at 9.

An examination of the Answer shows clearly that Respondent does not address the material allegations of the Complaint nor the preachments in *Landfill, Inc.*

By pleading a general denial Respondent also failed to comply with the requirements set forth in Section 22.05(c)(3) which states:

> (3) The original of any pleading, letter or other document (other than exhibits) shall be signed by the party filing or by his counsel or other representative,. The signature constitutes a representation by the signer that he has read the pleading, letter or other document, that to the best of

his knowledge, information and belief, the statements made therein are true, and that it is not interposed for delay.

Complainant contends that Respondent failed to respond to the allegations set forth in the Complaint as demanded by Section 22.15(d)(3) because Respondent chose to use the excuse that a review of its records was underway to avoid admitting the allegations set forth therein that the Respondent knows are true.

The defense in the introductory paragraph of Respondent's Answer which appears to be a sweeping general denial, is later applied to all of the counts in the Complaint. Complainant contends that the Answer does not "clearly and directly . . . deny . . . [any material] factual allegation contained in" any of the counts in the Complaint, a requirement of 40 C.F.R. §§ 22.15(b) and (d).

In each of the counts there is a charge that Respondent failed to file a Form R for the chemical usage of either acetone or styrene over a period of five consecutive years. These allegations are included in Respondent's denials.

The denials are based on the representation that Respondent "is continuing to review its records and is at the present time unable to respond to" the particular allegation. The foregoing representation requires the speculation that at some future time Respondent will complete the review of its records and be capable of making some kind of response.

Respondent's Answer to Civil Complaint is even more preposterous when viewed from a historic perspective. The Complaint at paragraph 6 tells us that the EPCRA Inspection took place on

November 15, 1993. The Answer was filed on July 14, 1994, some eight months later. While the Answer does not indicate when the Respondent's records review commenced or the resources commited to that review, but if it is assumed that it began soon after November 15, 1993, and was still in progress some eight months later, on July 14, 1994, then, there is reason to believe that Respondent has little or no concern for its responsibility under EPCRA and that there is more amiss at the Facility than the failure to file the Form Rs over a period of five consecutive years.

Complainant contends that the representations with respect to denials based on the records review are intended to mislead, and are misleading, and patently disengenuous. The denials coupled with the representation regarding a search of Respondent's files does not directly deny the allegation in the Complaint, a requirement of the Rules of Practice.

Thus, the Answer is cleverly worded so to avoid admiting the allegations in the Complaint with respect to failure to submit the Form R which Respondent knows are true. 40 C.F.R. § 22.05 (d)(3). Sweeping away the attempted general denial based on the records review by Respondent leaves the Answer admitting the allegations in the Complaint that Respondent failed to file the Form Rs for the chemical releases in the years stated.

III. PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Proposed Findings of Fact.

1. Catalina Yachts, Inc. is a California corporation.

2. Catalina Yachts, Inc. is a "person" within the meaning of Section 329(7) of EPCRA [42 U.S.C. § 11049(7)].

3. Catalina Yachts, Inc. is the Respondent named in the above-entitled administrative enforcement action.

4. Respondent is an owner and operator of a "facility" as that term is defined by Section 329(4) of EPCRA.

5. The Facility is located at 21200 Victory Boulevard, Woodland Hills, CA 91364.

6. The Facility has 10 or more "full-time employees," as that term is defined at 40 C.F.R. § 372.3.

7. The Facility is classified in Standard Industrial Classification Code 3732.

8. During calendar years 1988, 1989, 1990, 1991 and 1992, toxic chemicals at the Facility were "processed and otherwise used," as defined in 40 C.F.R. § 372.13, in quantities exceeding the established thresholds.

9. Subsection 313(1b) of EPCRA and 40 C.F.R. § 372.22 require that an owner and operator of a facility subject to the requirements of Subsection 313(b) of EPCRA and 40 C.F.R. § 372.22 submit a Form R for each such chemical for the applicable reporting year.

10. The requirements of Section 313 of EPCRA apply to the Facility.

11. During the calendar year 1988, Respondent otherwise used approximately 308,168 pounds of acetone, a chemical listed under 40 C.F.R. § 372.65.

12. The quantity of acetone used by Respondent at the Facility exceeds the established threshold of 10,000 pounds for 1988.

13. Respondent was required to submit a Form R for acetone to the Administrator, EPA, and to the State of California, on or before July 1, 1989.

14. Respondent failed to submit a Form R for acetone to the Administrator, EPA and to the State of California, on or before July 1, 1989.

15. During the calendar year 1989, Respondent otherwise used approximately 101,655 pounds of acetone, a chemical listed under 40 C.F.R. § 372.65.

16. The quantity of acetone used by Respondent at the Facility exceeds the established threshold of 10,000 pounds for 1989.

17. Respondent was required to submit a Form R for acetone to the Administrator, EPA, and to the State of California, on or before July 1, 1990.

18. Respondent failed to submit a Form R for acetone to the Administrator, EPA and to the State of California, on or before July 1, 1990.

19. During the calendar year 1988, Respondent processed approximately 1,784,078 pounds of styrene, a chemical listed under 40 C.F.R. § 372.65.

20. The quantity of styrene processed by Respondent at the Facility exceeds the established threshold of 50,000 pounds for

1988.

21. Respondent was required to submit a Form R for styrene to the Administrator, EPA, and to the State of California, on or before July 1, 1989.

22. Respondent failed to submit a Form R for styrene to the Administrator, EPA and to the State of California, on or before July 1, 1989.

23. During the calendar year 1989, Respondent processed approximately 2,691,348 pounds of styrene, a chemical listed under 40 C.F.R. § 372.65.

24. The quantity of styrene processed by Respondent at the Facility exceeds the established threshold of 25,000 pounds for 1989.

25. Respondent was required to submit a Form R for styrene to the Administrator, EPA, and to the State of California, on or before July 1, 1990.

26. Respondent failed to submit a Form R for styrene to the Administrator, EPA and to the State of California, on or before July 1, 1990.

27. During the calendar year 1990, Respondent processed approximately 898,416 pounds of styrene, a chemical listed under 40 C.F.R. § 372.65.

28. The quantity of styrene processed by Respondent at the Facility exceeds the established threshold of 25,000 pounds for 1990.

29. Respondent was required to submit a Form R for styrene

to the Administrator, EPA, and to the State of California, on or before July 1, 1991.

30. Respondent failed to submit a Form R for styrene to the Administrator, EPA and to the State of California, on or before July 1, 1991.

31. During the calendar year 1991, Respondent processed approximately 624,441 pounds of styrene, a chemical listed under 40 C.F.R. § 372.65.

32. The quantity of styrene processed by Respondent at the Facility exceeds the established threshold of 25,000 pounds for 1991.

33. Respondent was required to submit a Form R for styrene to the Administrator, EPA, and to the State of California, on or before July 1, 1992.

34. Respondent failed to submit a Form R for styrene to the Administrator, EPA and to the State of California, on or before July 1, 1992.

35. During the calendar year 1992, Respondent processed approximately 660,798 pounds of styrene, a chemical listed under 40 C.F.R. § 372.65.

36. The quantity of styrene processed by Respondent at the Facility exceeds the established threshold of 25,000 pounds for 1992.

37. Respondent was required to submit a Form R for styrene to the Administrator, EPA, and to the State of California, on or before July 1, 1993.

38. Respondent failed to submit a Form R for styrene to the Administrator, EPA and to the State of California, on or before July 1, 1993.

B. Proposed Conclusions of Law.

1. Respondent's failure to timely submit the Form Rs to the Administrator, EPA, and to the State of California, for usage of acetone and styrene in the years 1988, 1989, 1990, 1991 and 1992 was in violation of Section 313 of EPCRA and 40 C.F.R. Part 372.

IV. CONCLUSION.

Complaint urges the Presiding Administrative Law Judge to find that the denials set forth in the Answer on the basis of a continuing records review at the Facility, are a mere sham and do not put in issue the allegations in the Complaint. Complainant further urges the Presiding Administrative Law Judge to find that by pleading denials based on review of the records at the Facility, Respondent failed meet the criteria for an answer set forth in Section 22.15(b), that is, to clearly and directly deny the allegations in the Complaint. By such failure Respondent has in effect admitted the allegations in the Complaint as provided in Section 22.15(d). Finally, Complainant urges the Presiding Administrative Law Judge to issue an Initial Decision in Complainant's favor and against Respondent as to liability for failure to submit the Form Rs for the usage of the chemicals indicated for the five year period as alleged in the Complaint.

Dated: October 4, 1994.

Respectfully submitted,

David M. Jones
Counsel for Complainant

EXHIBITS ATTACHED:

Exhibit A - Complaint and Notice of Opportunity for Hearing

Exhibit B - Answer and Request for Administrative Hearing